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No. 76-967

# In the Supreme Court of the United States

OCTOBER TERM, 1976

UCO OIL COMPANY AND DONALD SIMEON,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
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Petitioners contend that the multiple-count indictment in this case was duplicitous.

An indictment returned in the United States District Court for the Central District of California charged petitioners—a privately-owned oil company (UCO) and its corporate comptroller—with numerous counts of having fraudulently concealed material facts in false documents submitted to the Internal Revenue Service, in violation of 18 U.S.C. 1001.[1] The documents in question were gasoline service station activity reports, credit card invoices,

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[1]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material

and maximum selling price forms that reported the retail price charged for gasoline, the volume of gasoline sold or the total revenue derived from such sales at particular UCO stations. Each count was based upon a single document and charged, in substance, that the document was both a false statement and a concealment of a material fact by trick, scheme, or device.[2]

In a pretrial motion to dismiss the indictment, petitioners argued that each count was duplicitous because it stated two separate offenses. Following a hearing, the district court granted petitioners' motion and dismissed the indictment (Tr. 136-138, 141-147).[3] On appeal, the court of appeals reversed, holding that Congress, in enumerating several different types of fraudulent conduct in Section 1001, did not create separate and distinct offenses but simply listed different means by which the same offense could be committed (Pet. App. 8).

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fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[2]Count three of the indictment, which is typical, alleged that petitioners "knowingly and willfully made and used false writings and documents knowing the same to contain false, fictitious and fraudulent statements and entries and falsified, concealed, and covered up by trick, scheme and device material facts, that is, the true and correct retail price per gallon of regular, ethyl, premium or diesel fuel sold at various UCO service stations * * *, in that the defendants knowingly and willfully made and caused to be made, submitted and caused to be submitted to IRS [the following] false writing[ ] and document [ ] * * *."

[3]"Tr." refers to the one-volume transcript of the hearing on petitioners' motion to dismiss the indictment.



1. Petitioners contend (Pet. 8-11) that each count of the indictment, charging them with knowingly making a false statement and concealing a material fact by trick, scheme or device, alleged two separate and distinct offenses. Whatever may be the merit of this contention, and we argue below that there is none, there is no need for the Court to grant review at this time.

The petition challenges only the court of appeals' reversal of the district court's pretrial dismissal of the indictment, a reversal that puts petitioners in the same position as if the district court had ruled against them in the first instance. That ruling would not have been subject to interlocutory appeal. See *Cobbledick* v. *United States,* 309 U.S. 323; *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook Railroad Co.,* 389 U.S. 327. Similarly, review by this Court of the court of appeals' decision would be premature. At trial petitioners may be acquitted, in which case their claim will be moot. If, on the other hand, petitioners are convicted and the convictions are affirmed, they will then be able to present their contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals correctly rejected petitioners' contention in a thorough opinion upon which we rely (Pet. App.). In concluding that 18 U.S.C. 1001 states a single offense that may be accomplished by different means, the court analyzed in detail the language of the statute, its legislative history, and the nature of the conduct that it proscribes, and the application to the statute of the rule that doubts in the enforcement of a criminal statute are to be resolved against the imposition of multiple punishment. The court found that the statute, which is framed in a single paragraph and provides for a single penalty, "is directed at a single evil, i.e., the 'perversion' of 'the authorized functions of governmental departments and agencies

. . . which might result from the deceptive practices described.' *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941)" (Pet. App. 4). The court reasoned that "[t]he types of conduct enumerated all fall within the general understanding of what constitutes fraud"[4] and that it was therefore logical to conclude "that Congress was concerned with proscribing the prohibited result rather than particular kinds of conduct" (Pet. App. 4). The court went on to state (*id.* at 6-7):

> * * * [T]he making of false statements and the concealment of a material fact by trick, scheme and device are not distinctly different kinds of conduct. Not only are they regarded as within the conventional understanding of fraud but they may well merge into each other, blurring any conceptual distinctions one might otherwise find. Thus, in this case, the government charges that the making of a report which falsely states total gallons sold may also result in a device by which the true price per gallon is concealed. Reason and fairness support the conclusion that only one offense is charged.[5]

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[4]Cf. *Charles Hughes & Co.* v. *Securities and Exchange Commission*, 139 F. 2d 434, 437 (C.A. 2):

> The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other.

See also *Gusow* v. *United States*, 347 F. 2d 755, 756 (C.A. 10).

[5]Petitioners rely upon *United States* v. *Diogo*, 320 F. 2d 898, 902 (C.A. 2), in which the court, *in dictum*, stated that Section 1001 "encompasses within its proscription two distinct offenses, concealment of a material fact and false representations." The primary support for this statement, however, was the prior decision in *United States* v. *Uram*, 148 F. 2d 187, 190 (C.A. 2), in which the court pointed out that the acts alleged (false statements and concealment of a material fact) "did not even concern the same facts." The court of appeals in this case agreed that "[w]here the evidence of several acts or transactions alleged to violate Section 1001 differs substantially from one to the other, separate counts would presumably lie," but it properly declined to construe the above-quoted statement from *Diogo* to mean "that the government could base two counts on the making of a single false document, charging that it is a false statement in one and concealment in the other. See *Prince* v. *United States*, 352 U.S. 322 (1957); *United States* v. *Myers*, 131 F. Supp. 525 (N.D. Cal. 1955)" (Pet. App. 3 n. 2).



3. In reaching its conclusion, the court of appeals stated: "It is not a valid objection * * * that the jury, in arriving at a unanimous verdict, may not agree on the particular means by which the offense was committed" (Pet. App. 8). Petitioners now contend (Pet. 11-15) that this statement will preclude them from obtaining an instruction "that the jury must be unanimous as to which of the two specific means of violation was proven beyond a reasonable doubt" (Pet. 13).

Whether or not such an instruction would be appropriate in another case, it is clear that, under the indictment in this case, the instruction would be unnecessary. As to each count, the indictment charges that petitioners "knowingly and willfully made and used false writings and documents knowing the same to contain false * * * statements and entries and falsified, concealed, and covered up by trick, scheme and device material facts, that is, the true and correct retail price per gallon * * *, *in that* [they] knowingly and willfully made and caused to be made * * * false writings and documents [representing either that certain revenues had been received or that a certain quantity of gallons had been sold for a certain total price or at a certain price per gallon or unit cost] * * *" (emphasis added). It is thus apparent that, to find that the defendants "concealed" material facts—*i.e.*, the true retail price per gallon—the jury will have to find beyond a reasonable doubt that they deliberately prepared documents containing false statements regarding volume sold, total revenue

or retail price. Under this indictment, a finding that petitioners concealed material facts would necessarily entail a finding that they made and submitted false statements, and there is thus no merit to petitioners' claim that some members of the jury might find concealment and others find the making of false statements.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.*

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